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## E-Discovery & Document Retention

Steptoe & Johnson LLP's cross-disciplinary E-Discovery and Document Retention practice assists clients to manage their electronic discovery obligations in litigation and to create or revise electronic document retention policies to comply with Sarbanes-Oxley and similar EU regulations, other similar statutory and regulatory schemes, and evolving electronic discovery document preservation standards.

Furthermore, Steptoe's Complex Litigation & Discovery Center has over 100 attorneys and other professional staff dedicated to conducting the review of documents and electronic files in support of our firm's legal services.

### Electronic Discovery

The discovery of electronic information and documents is now at the centerpiece of every litigation. An ever-increasing percentage of corporate and personal information and documents are stored electronically, and an ever-increasing percentage are only stored electronically. When litigation is reasonably anticipated, the courts now expect that the parties will put litigation holds into effect to prevent the destruction of relevant information and documents and to ensure that newly created relevant documents are preserved for disclosure in the litigation.

The failure to properly preserve, locate, and disclose relevant electronically stored information (ESI) can lead to catastrophic results. Several highly publicized, recent sanction orders against major corporations include:

- A recent spoliation order against a national brokerage firm that led to a directed verdict on liability issues, and eventually a verdict for \$1.58 billion
- A recent spoliation order that assessed \$2.5 million in civil litigation sanctions against a major tobacco company and precluded it from calling 11 witnesses in the current federal tobacco trial
- Orders that directed adverse inference instructions, evidence preclusion, dismissal, default, and fines due to loss or destruction of evidence
- Reversal of a \$100 million award to a corporate plaintiff for failure to locate and produce e-mails in a timely manner

Federal, state, and local rules amendments will require that parties meet and confer at the outset of discovery to describe how their own clients deal with ESI, how and where ESI is stored, and how to obtain disclosure of ESI from their adversary. New procedures have been adopted that will affect how

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documents are requested and how interrogatories are written, and how accessible and inaccessible data can be addressed.

Against this backdrop, litigants must retain attorneys who not only know and understand the new rules and procedures, but also have a deep understanding of how ESI is stored, organized, and retrieved, as well as how data can be lost. Electronic storage media are ubiquitous and come in a variety of forms and formats. Moreover, knowledge of how to implement computer forensic techniques is critical to enable recovery of relevant ESI that has been lost inadvertently or intentionally.

Fortunately, Steptoe has a team of attorneys that have been involved in working with electronic and computerized information for nearly 30 years, and have been speaking and writing extensively about the discoverability and use of ESI in discovery and at trial. Our attorneys have been at the forefront of the rules amendment process undertaken by the Advisory Committee on the Federal Rules of Civil Procedure, have participated in the Sedona Conference that has developed best practices and guides regarding electronic discovery and document retention, have spoken nationally through a variety of bar associations and CLE providers on the law and practice of electronic discovery and document retention, and have also written articles and comprehensive written materials on these topics.

As a result of this accumulated experience, Steptoe attorneys can help corporate law departments create procedures and forms to deal with broad categories of litigation, or to deal with specific electronic discovery issues and problems on a case-by-case basis by helping those clients to:

- **Prepare** document hold notices and preservation protocols to comply with growing case law of e-discovery;
- **Identify** the electronic information and documents that are relevant to imminent litigation or responsive to discovery requests;
- **Locate** the electronic information and documents among the myriad electronic storage media and corporate information systems, using state-of-the-art computer and software search techniques;
- **Retrieve** the relevant and responsive electronic information and documents, using state-of-the-art collection methods and computer technologies;

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- **Preserve** the relevant and responsive electronic information and documents by developing litigation hold notices and processes to be used by your organization;
- **Review** the collected electronic information and documents to determine what portion is relevant and responsive, using state-of-the-art methods and computer hardware and software in the most cost-effective manner to control costs;
- **Sort** privileged electronic information and records out of the production set, and create appropriate logs in compliance with applicable law; and
- **Produce** the relevant and responsive electronic information and documents to the opposition on appropriate media in the most cost-effective manner.

Most importantly, Steptoe attorneys can help you **comply** with your electronic discovery obligations under the law and reduce the risk of sanctions and adverse results that have been so prominently reported in the news over the past several years.

The **Complex Litigation Discovery Center (CLDC)** was established in 2003 in Rockville, Maryland. Steptoe's Complex Litigation and Discovery Center brings together the experienced personnel, the physical facilities, and the technology systems and know-how to perform the legal analysis of documents and electronic files accurately and cost-efficiently. This is a turnkey operation dedicated to that function applying tried and true quality assurance protocols.

The CLDC has reviewed millions of documents and electronic files successfully for a variety of legal endeavors, such as:

- Commercial, insurance, intellectual property, and other complex litigation
- Antitrust litigation and Hart-Scott-Rodino compliance
- Transactional due diligence
- Internal corporate investigations
- White-collar defense

### Electronic Document Retention

Fueled by Sarbanes-Oxley requirements and penalties, increasingly severe

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highly publicized litigation sanctions orders, and the rapidly spiraling costs of electronic discovery, more and more general counsels are trying to develop corporate electronic document retention policies to protect their companies. This often also requires a coordinated legal and IT department assessment of the current electronic document management system.

Companies that fail to do so face mounting risks:

- **Spoliation risk:** dismissal or default sanctions, fines, or evidence preclusion for loss or destruction of evidence
- **Cost of retrieval risk:** astronomical costs associated with e-discovery fishing expeditions
- **Inability to defend risk:** inability to properly defend a claim due to loss of critical evidence

We can help you to:

- **Write** a policy that includes retention schedules regarding electronic communications and other electronic documents and that complies with statutory and regulatory requirements, current reported case law, and The Sedona Guidelines, while at the same time allowing for your company's unique needs, culture, business processes, and IT environment;
- **Develop** an implementation, compliance, and auditing plan;
- **Implement** a comprehensive, attorney/client privileged training program;
- **Establish** a procedure for litigation holds to meet evolving legal requirements related to preserving documents when the company reasonably anticipates litigation;
- **Establish** a procedure for responding to litigants' discovery requests;
- **Establish** a uniform indexing and document naming system; and
- **Assess** the current storage situation and develop a storage/disposal plan to deal with un-indexed legacy documents.

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### Representative Matters

- **Advised** a major company in the healthcare industry on developing new document retention policies, focusing on electronic retention and hold-placing issues when the company faces possible retention requirements due to litigation, government investigations, or other proceedings.
- **Advised** a federally regulated banking institution subject to ongoing regulatory, Congressional, and DOJ investigations with respect to its document retention and preservation policies.
- **Advised** a Fortune 100 manufacturing firm in the technology and communications industries, rewriting its paper-based document retention policy to apply it to electronic communications, and researching and re-drafting document retention schedules in accordance with applicable statutes and regulations, and providing counsel about an IT-presented training program.
- **Advised** a governmental federal agency with a heavy litigation docket concerning such needs as a comprehensive electronic document and email management and retention program, the application of the Federal Records Act, the legal risks it faced in failing to adopt such a policy, and the elements of a sound electronic document management and retention program.
- **Assisted** a Florida land development company with associated escrow, title, and mortgage lending subsidiaries to develop a policy that included provisions for electronic records and emails, litigation holds, retention schedules, and a training program.
- **Advised** a leading UK life insurance group working on a number of significant cross-border operations for this client, principally on the French and Belgian markets, but also in relation to other European jurisdictions, on cross-border distribution of savings products and has, over the last five years or so, included advice on document retention policies and procedures.
- **Helped** develop a comprehensive set of guidelines on data protection for consumer marketing (focused on online marketing), including document and data management and retention issues, for a leading international consumer products company.

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- **Advised** a leading UK insurance group regarding client confidentiality concerns specific to the life insurance/savings sector on a CRM project, involving consideration of electronic databases and signature issues, "full rewind" procedures, and various related questions, covering a number of EU jurisdictions. This advice also had to take into account third-party administration/outsourcing questions.
- **Advised** a leading UK banking group in a pan-European independent financial advisory project that raised a number of issues under EU and national legislation, in particular under Luxembourg and UK rules. This project included detailed consideration of client confidentiality rules, protection of personal data (EU-wide), document retention periods (including consideration of periods for limitation of actions), cross-border transfer of data, and the interaction of document retention procedures with other regulatory requirements, such as money-laundering compliance and tax considerations (in particular in the context of stringent Luxembourg secrecy laws).